Supreme Court, U.S.
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(1)

91-292
No.

In The

Supreme Court of the United States

October Term, 1991

Larry Walker
Petitioner,

vs.

Township of Tewksbury, et al
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

As to absolute immunity of Planning Board members:

I. Are Planning Board members absolutely immune in their individual capacities from damage actions brought pursuant to 42 U.S.C. § 1983 alleging equal protection and first amendment violations arising out of site plan review, where no discretionary action was either required or authorized by the state statute empowering the Planning Board?

II. Should Planning Board members enjoy absolute immunity in their individual capacities from damage claims with respect to any official action, simply because the state stature empowering the Board authorizes discretion on a limited basis, while predominantly authorizing action which is purely administrative and/or advisory?

III. Should the tests of discretionary or quasi-judicial actions of Planning Board members to determine absolute immunity be applied in a broad sense to the Planning Board in general, or to the specific action challenged by damage claimants?

As to Fifth Amendment Taking Claims:

IV. Is it appropriate for a U.S. District Court, on reconsideration of its own decision, to grant Plaintiff's motion for

reconsideration, leaving open the possibility for new litigation of an existing cause of action, instead of vacating its previous summary judgement as to the cause of action in question?

V. Is it an unreasonable burden and adverse to judicial economy to require pursuit of "Taking Claims" in state court as prerequisite to litigation under 42 U.S.C. § 1983 in the U.S. Courts, if the state remedies do not afford the panoply of remedies available under 42 U.S.C. § 1983?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Larry Walker and the following respondents:

The Township of Tewksbury
a municipal corporation,
Township Committee of the
Township of Tewksbury,
Tewksbury Township Planning Board,
Gerhard H. Fuchs, Kenneth Lee Hahn,
James H. Lynch, Jr., John P. Madigan,
Peter E. Moll, Charles W. Halsey, Jr.,
Richard R. Width, Harlen K. Welsh,
Robert W. Metcalfe and Robert J. Fritz.

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Circuit Courts of Appeals Cases:

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Federal Statutory Provisions:

42 U.S.C. § 1983 ..... i, iii, 1, 2, 14, 20, 21

State Statutory Provisions:

N.J.S.A. 40:55D-25 ..... 2, 14, 15

N.J.S.A. 40:55D-37 ..... 2, 15

N.J.S.A. 40:55D-48 ..... 2, 8, 15

OPINIONS BELOW

No opinion by the United States Court of Appeals for the Third Circuit was given. The Third Circuit January 31, 1989 affirmation of the District Court decisions has been reproduced on page 29a of the appendix. The Third Circuit March 28, 1991 order denying petition for rehearing has been reproduced on page 31a of the appendix.

The District Court Summary Judgement order of July 6, 1989 has been reproduced on page 1a of the appendix. The District Court memorandum and Order of September 8, 1989 has been reproduced on page 3a of the appendix. The District Court Memorandum and Summary Judgment order of January 31, 1990 has been reproduced on page 8a of the appendix. The district Court Memorandum and Order granting reconsideration of June 25, 1990 has been reproduced on page 24a of the appendix.

JURISDICTIONAL STATEMENT

Invoking federal jurisdiction under 42 U.S.C. § 1983, the petitioner brought this suit in the District of New Jersey. Respondent's motions (two) for Summary Judgment were granted on July 6, 1989 and January 31, 1990 precluding a trial.

On appeal to the Third Circuit by the petitioner, both District Court Orders were affirmed. A Petition for Rehearing by the Petitioner was denied on March 28, 1991.

The jurisdiction of this Court to review the judgement of the Third Circuit is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner will rely on 42 U.S.C. § 1983, and New Jersey Municipal Land Use Law. Three sections of The N.J.S.A. 40:55D are reproduced in the appendix (40:55D-25, page 34a, 40:55D-37, page 35a, and 40:55D -48, page 36a).

STATEMENT OF THE CASE

Plaintiff, petitioner, Larry Walker, (hereinafter referred to as "Walker"), is the owner of 121 acres of farmland in the Township of Tewksbury, County of Hunterdon, State of New Jersey. In the spring of 1988, Walker submitted an application for preliminary major subdivision of the land to the Municipal Planning Board, and concurrently applied for approval to six (6) other Federal, State, County and local regulatory authorities having jurisdiction. All applications were in compliance with the Federal, State, County, and Municipal Statutes, ordinances and regulations.

Walker's application was heard by the Tewksbury Township Planning Board at five Public Hearings as required by the New Jersey Municipal Land Use Law during the months of August, through November of 1988. During that same period, Walker had received approval from the six (6) other agencies previously mentioned, and entered said approvals as evidence at the Public Hearings. On December 7, 1988, at a regularly scheduled meeting of the Planning Board, a motion was made to approve Walker's application, and after discussion by the Board, the motion was approved, thereby granting preliminary subdivision approval for nineteen (19) new lots. As is the State requirement and custom, the board's action was memorialized in a written resolution of approval at a subsequent meeting on December 21, 1988.

In spite of the fact that Walker's application and plans conformed with

the requirements of every governmental and regulatory agency having jurisdiction, the Planning Board imposed seven (7) conditions on which the approval was contingent. Walker, believing that the conditions were unreasonable and/or not within the scope of the Board's authority to impose, appealed to both the Planning Board and the Township Committee (the municipal governing body), to reconsider the action of the Board. Being unable to convince the Board to remove the challenged conditions from the subdivision approval within the statutory period provided to appeal such Planning Board actions, Walker appealed their decision.

Walker filed a complaint in lieu of prerogative writs in the Superior Court of New Jersey, Hunterdon County, on February 14, 1989. The complaint alleged that the Planning Board orally imposed several improper conditions, inter alia, a requirement for a conservation easement (condition #2) and a trail easement (condition #5). Named defendants were the Planning Board of the Township of Tewksbury and Hirschberg Development Company Inc. (purchaser under contract).

Concurrent with the Superior Court action, Walker filed a complaint on February 14, 1989 in the U.S. District Court, District of New Jersey. The complaint alleged, inter alia, that plaintiff had been irreparably injured by the wrongful, improper, illegal and unconstitutional decision of the Planning Board, which approved

the subdivision application, but attached conditions and restrictions contrary to law. Named defendants were Gerhard H. Fuchs, Kenneth Lee Hahn, James H. Lynch, Jr., John P. Madigan, Peter E. Moll, Charles W. Halsey, Jr., Richard R. Width, Harlen K. Welsh, Robert W. Metcalf and Robert J. Fritz, the Planning Board, the Township Committee, and the Township of Tewksbury.

As of this date, no issues have been adjudicated in the Superior Court of New Jersey action. A trial date of August 16, 1991 was set at the May 10, 1991 pretrial conference.

The United States District Court, District of New Jersey, granted summary judgment dismissing the complaint against the Township of Tewksbury, the Township Committee of the Township of Tewksbury, and the ten (10) individual defendants on July 6, 1989 (appendix page 1a). No opinion or memorandum was issued at that time.

The United States District Court, District of New Jersey, denied Defendant's motion for attorneys fees (appendix page 3a) on September 8, 1989. The Court's "Memorandum and Order" states that "the immunity of Planning Board members from damages claims did not become settled law in this circuit until Bass v. Attardi, 868 F2d 45 (3d. Cir. 1989), which was decided on the same day Plaintiff filed his complaint (page 5a). The memorandum refers to the Court's reason for dismissing the complaint against the ten (10) individuals based on absolute immunity, which is one

of two subjects of this Petition for Writ of Certiorari.

The United States District Court, District of New Jersey, granted Summary Judgement dismissing the complaint against the only remaining defendant, the Planning Board of the Township of Tewksbury (appendix page 8a) on January 31, 1990. While the District Court's "Memorandum and Order" addresses many topics, the second subject of this petition is "Taking Claim" (appendix page 15a).

The United States District Court, District of New Jersey, granted Plaintiff's motion for reconsideration on June 25, 1990 as to "The Taking Claim" (appendix page 24a). However, the Court's way of expressing its decision was to modify the language in the January 31, 1990 "Memorandum and Order", incorporating by reference the language in the June 25, 1990 "Memorandum and Order" with regard to the taking claim on reconsideration. The effect is to prevent the Plaintiff from being collaterally estopped from litigating the taking claim in the future, but does not vacate the previous judgement.

The United States Court of Appeals, for the Third Circuit, affirmed both the July 6, 1989 and the January 31, 1990 summary judgment orders (appendix page 29a) on January 30, 1991.

The United States Court of Appeals for the Third Circuit denied Plaintiff's Petition for Rehearing (appendix page 31a) on March 28, 1991. While the

Plaintiff petitioned for rehearing by the panel, the court treated it as a "Petition for Rehearing in Banc." The April 17, 1991 letter from the Deputy Court Clerk (appendix page 33a) makes clear that the Plaintiff requested a "Panel Rehearing."

The petitioner focuses on two issues in this case. First, the "Absolute Immunity" of Planning Board members in their individual capacities, on which the U.S. Court of Appeals for the Third Circuit relied to dismiss the complaint against ten individually named Planning Board members. Walker has asserted that there was no legal basis for the imposition of either the trial or conservation easements, as well as several other "conditions of approval." The Defendants offered no substantive proof of authorization by statute or any other basis. The actions of the Board members were clearly outside their jurisdiction and resulted in an environment for the applicant (Walker) where the Planning Board members were "making up the subdivision rules as they went along." The Township Committee (the municipal governing body) holds the power to legislate by ordinance on development regulations exclusively. Not only were the Planning Board members acting as legislators, which is clearly outside their jurisdiction, the "unauthorized law" requiring things of Walker in the "conditions of Approval" were required only of Walker. As previously stated, Walker's application before the Planning Board was in compliance with all requirements of governmental and regulatory agencies.

which were the standard for review by the Planning Board.

The New Jersey Municipal Land Use Law, N.J.S.A. 40:55D is clear on the standards to be met by an application for subdivision approval. Specifically, N.J.S.A. 40:55D-48 (b) states that "The Planning Board shall, if the proposed subdivision complies with the ordinance and this act, grant preliminary approval to the subdivision" (appendix page 36a). Unless a Planning Board applicant is asking for approval of a subdivision which is "not" in compliance with the ordinance, there is nothing discretionary or quasi-judicial about the Planning Board's review and approval. As the statute states, the "Planning Board Shall" grant approval to applications in compliance. The Board's role in Walker's application was purely administrative, since they had no authority under the statute to deny approval of his subdivision which was fully in compliance.

For the Court's enlightenment, the requirements and design standards included such things as minimum lot size, width, and depth, as well as design standards on roadways like width, paving specifications, grades, storm water drainage, and minimum curve specifications. Either these standards were met, or they were not. Since Walker had met all requirements and had requested no variances or design waivers, approval was mandated by the New Jersey statute and municipal ordinance which provides no discretion to the Planning Board. The Board members acted as if

they had the authority to legislate spontaneously, from minute to minute, by creating requirements over and above the statute and ordinance, calling them "Conditions of Approval." It shocks the conscience to think that Planning Board members can claim absolute immunity for "Taking the law into their own hands." The instant case is analogous to police officers ignoring speed limit signs, and deciding the speed limit differently each time they stop a driver on the road. The Board members were authorized to measure Walker's subdivision application against established and published standards, not to create new standards.

The second issue on which the Petitioner focuses in this case is the "Fifth Amendment Taking" claim. Two (2) of the seven (7) conditions of approval imposed required granting a conservation easement on approximately fifty (50) acres (condition #2) and a trail easement (condition #5) through the private property consisting of the nineteen (19) new residential building lots. Two things are undisputed about these conditions. First, there is no authority under the state statute or municipal ordinance for imposition of such easements, and second, neither the Planning Board or any arm of the municipal government offered even a hint of "just compensation" in return for the easements.

While the U.S. District Court dismissed the complaint with regard to the "Taking Claim", inter alia, on January 30, 1990, upon reconsideration that same court found that the court's decision

was not consistent with Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (appendix page 27a). In Nollan the California Coastal Commission conditioned the issuance of a permit to rebuild a beachfront home on the owners transfer to the public of an easement across their beachfront property. This court stated that "the Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization", as to the Commission's belief that the public would be served by such an easement. This court went on to say "Rather, California is free to advance it "comprehensive program" if it wishes, by using its power of eminent domain for this "public purpose", [483 US 842] See U.S. Const, Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it."

Nollan essentially parallels the instant case since in both actions, a condition was attached to an application to a regulatory agency for approval to do something which both applicants had the right to do, and accordingly were entitled to unconditional approval. In addition to issues of authority and just compensation which are clear, Walker had a great burden imposed on him by way of the impact on marketability of the subject property. Specifically, the trail easement would permit the public to pass to and fro through the private property of nineteen (19) private residential properties, with no published guidelines as to limitations

of the rights of the public with respect to the private property of the residents. There exists no state statute, municipal ordinance, or municipal guideline of any sort which would be reasonably available to the public which describes the circumstances under which the public has access.

The issue of the health and safety of the children of homeowners over whose land such easements run is a serious one. There is nothing to prevent would be child molesters, rapists, burglars or any unsavory character from following a foot path through the yards in which children and other family members are involved in recreational activities. Said easements are not easily patrolled by police unless on foot or horseback for which the Township has no plan or current provision. Further, the land owners of the lots in question are restricted as to fences, swimming pools, horse barns, tennis courts, or any other structure which would impede the flow of "trail" traffic. All of the foregoing have contributed to the reluctance of the purchaser under contract or any subsequent potential buyers to take title to the subject property. The question of now much value was lost due to the Planning Board's actions becomes moot if the landowner is unable to interest anyone at all in purchasing the property.

The petitioner's objection with regard to the within application to the Court is twofold. Walker contends that on reconsideration as previously explained,

the U.S. District Court should have vacated the previous summary judgement as to the taking claim, instead of simply permitting Walker to "relitigate" after pursuing a remedy in State Court. Walker will then be faced with starting all over again at great expense in terms of time and costs of suit. The U.S. District Court could have simply waited until Walker exhausted the state court action remedy and then proceeded within the framework of the existing complaint.

Secondly, under Nollan it is without question that the Planning Board has effected a "Taking without just compensation." There is no need for a state court to establish that. Sending Walker to the state court is an undue and unreasonable burden under Williamson County Regional Planning Commission v. Hamilton Bank, 473, U.S. 172 (1985) on which the U.S. District Court relied in the June 25, 1990 decision granting reconsideration (appendix page 26a).

REASONS FOR GRANTING THE WRIT

As to Absolute immunity of Planning Board Members:

I. The issue of whether Planning Board members are entitled to absolute immunity in their individual capacities for all acts regarding site plan review, including those where no discretionary action was either required or authorized, has not, but should be settled by this Court.

II. The decision of the U.S. District Court and the Third Circuit affirmation of same, based on the Third Circuit's decision in Bass v. Attardi, 868 F.2d 45 (3d Cir. 1989), is inconsistent with this Court's decision in Wood v. Strickland 420 U.S. 308 (1975).

As to the Fifth Amendment Taking Claims:

III. The decision of the U.S. District court and the Third Circuit affirmation of same, are inconsistent with Williamson County Planning Commission v. Hamilton Bank, 473 U.S. 172, (1985).

ARGUMENTS

I. ABSOLUTE IMMUNITY OF PLANNING BOARD MEMBERS.

THE THIRD CIRCUIT'S DECISION IN BASS V. ATTARDI, APPLYING THE "ABSOLUTE IMMUNITY" STANDARD "ACROSS THE BOARD" TO ALL PLANNING BOARD MEMBERS, HAS TAKEN A BROAD BRUSH APPROACH IN AN AREA WHERE THIS COURT HAS HISTORICALLY PROCEEDED CAUTIOUSLY, AUTHORIZING SUCH STATUS SPARINGLY.

In Bass vs. Attardi, 868 F.2d 45, 48 and 50, (3rd cir. 1989), the Third Circuit affirmed the January 22, 1988 decision of the District Court which held that "the Planning Board was a quasi-judicial body; as such, its members and agents were absolutely immune from suit. "The Third Circuit went on to say "We therefore conclude that members of municipal Planning Boards in New Jersey are absolutely immune in their individual capacities from damage actions brought pursuant to 42 U.S.C. § 1983 alleging equal protection and first amendment violations arising out of site plan review conducted pursuant to N.J. Statute Annotated § 40:55D-25 (a) (2)."

The operative term in Bass is "Quasi-judicial." However, N.J.S.A. 40:55D-25 (a) (2) on Powers of Planning Board (appendix page 34a) in subdivision control and site plan review is one of six (6) areas within the statute in which the board "shall" exercise its power, along with three other areas in which the board participates.

Review of the statute will yield a conclusion that the Planning Board's job is primarily advisory and/or administrative. the only exception is in one (1) out of nine (9) duties (paragraph (a) (6)) where variances and conditional uses are reviewed. Further, N.J.S.A. 40:55D-37 on "Grant of Powers" (appendix page 35a) mentions no discretionary or quasi-judicial latitude whatsoever. N.J.S.A. 40:55D-48 on "Procedure for Preliminary Major Subdivision Approval" (appendix page 36 a), the sole purpose for which Walker was before the Planning Board, states (paragraph 6) that "The Planning Board shall, if the proposed subdivision complies with the ordinance and this act, grant preliminary approval to the subdivision." The approval sought by Walker was quintessentially a mandate for approval by the New Jersey State legislature, provided that Walker's application conformed to the established standard, which the Planning Board has never questioned as being the case.

Bass has in effect established a standard which is impermissibly vague to the extent that the statute on which it bases its conclusion actually contradicts the conclusion. The statute referred to in Bass (N.J.S.A. 40:55D-25 (a) (2)) leaves absolutely no room for discretion by the Planning Board and thereby removes the "Quasi-judicial" umbrella from the very activity on which Bass focused. On that aspect alone, this Court has a solid foundation to both reverse Bass, and fashion an accurate and equitable test on which to base absolute immunity.

Considering that Bass involved a parking variance, the review of which is one of the limited areas where the New Jersey Statute confers "discretionary" powers on its Planning Boards, it is clearly not appropriate to compare to Walker, since the Bass application requested relief from a requirement in the ordinance, and Walker complied fully with the ordinance, requesting no such discretionary or quasi-judicial action. Bass assumed that all Planning Board applications require variances or such things which require the board's discretion. Conversely, the Bass application is the exception and not the rule.

The ramifications of Bass are threefold.

1. New Jersey Planning Board members have the highest standard of immunity applied to all actions, in spite of the fact that their quasi-judicial powers relate to only a small percentage of their total work load.

2. It is commonly held that absolute immunity extends the immunity shield over abusive and malicious acts, thereby removing the threat of consequences.

3. It opens the door for politically appointed Planning Board members to in effect "legislate" with no due process or statutory authority, under the cover of absolute immunity.

The foregoing is neither an appropriate enhancement to the powers of Planning Board members or in the interest

of the public. A practical effect is likely to be an avalanche of suits against Planning Boards, at the expense of the taxpayers, due to the reckless acts of Board members, for whom there are no consequences.

THE THIRD CIRCUIT'S DECISION IN BASS V. ATTARDI IS INCONSISTENT WITH THE COURTS PRIOR RULING IN WOOD V. STRICKLAND AND EXCEEDS THE LIMITS ON IMMUNITY OF PUBLIC OFFICIALS THEREIN.

Absolute immunity has long been reserved for those who serve in purely judicial capacities. Functions that are absolutely judicial require immunity from suit that is just as absolute. Conversely, functions that are quasi-judicial require the lower standard of qualified immunity. This Court has so stated in Wood v. Strickland, 420 U.S. 308 1975 where qualified immunity was granted to School Board members functioning as "adjudicators in the school disciplinary process." Accordingly, while the Court believed certain aspects of the School Board members' job to be "judicial," qualified immunity provided a reasonable defense against suit for such actions, but did not shield the members individually with regard to the balance of their actions which are predominantly administrative and require no such protection. Qualified immunity has proven to provide the best of both worlds; immunity for discretionary or quasi-judicial acts, and accountability for acts outside that realm of activity.

Given that Bass applies absolute immunity to the "office holder" based on any

evidence of discretion in the performance of prescribed duties, the potential for every public official to be asbolutely immune exists. Whether in the public or private sector, there exists no management position that is completly free of "grey areas" requiring some degree of discretion. The scenario is inherent in all management functions. If Bass is to survive, and any public official can claim absolute immunity regarding all actions, based on minimal discretionary authority, it follows that every public official will eventually fall under the highest standard of immunity. Such a holding by this Court would encourage legislators everywhere to authorizee a limited amount of discretionary authority by statute to all public officials, opening the door to "absolute immunity for all."

In Harlow v. Fitzgerald, 457 U.S. 800. 821, 102 S. Ct. 2738, 2739, Justice Brennan concurring states "This standard would not allow the official who actually knows that he is violating the law to escape liability for his actions, even if he could not "reasonably have been expceted" to know what he actually did know." This view is on point with the case at bar since in Walker's brief to the District court he points out, and defendants have acknowledged, that the Planning Board Chairman stated "if he (Walker) dosen't want to give it to us, we can't force him because we don't have it in the ordinance," regarding the trail easement. At the same meeting, the Board voted approval conditioned on Walker granting the trail easement, which a short while earlier

the chairman acknowledged was not authorized by ordinance. The Third Circuit's application of Bass is an egregious conclusion inconsistent with this Court's position which under Wood calls for a "failed test of qualified immunity."

THE TEST TO DETERMINE THE LEVEL OF IMMUNITY AFFORDED PUBLIC OFFICIALS IN THEIR INDIVIDUAL CAPACITIES SHOULD FOCUS ON THESE FINDINGS:

a) IS DISCRETION AUTHORIZED BY STATUTE?
b) DOES THE ISSUE DECIDED FALL UNDER SAID STATUTE?
c) WAS THE PUBLIC OFFICIAL ACTING WITHIN THE JURISDICTION PRESCRIBED BY STATUTE?

A fundamental deficiency in Bass is the application of the immunity test to the "office" as opposed to the "action" of a public official. Litigation in this area is usually the result on an action by a public official an not a result of the existence of the office. It follows that the "action" should be the target of any measure on determination of immunity, unless the office exists solely to perform judicial functions. There is no need to explore purely judicial functions since this Court's position is clear and well settled on that topic. Based on the foregoing, Walker urges this Court to reject the Bass approach, and to set an immunity "test standard" incorporating all pertinent aspects of prior rulings, employing methodology which focuses on the action and not the office.

II. THE FIFTH AMENDMENT TAKING CLAIM.

ON GRANTING RECONSIDERATION OF ITS DECISION, THE DISTRICT COURT SHOULD HAVE VACATED THE PREVIOUS SUMMARY JUDGMENT AS TO THE FIFTH AMENDMENT TAKING CLAIM.

In view of Nollan v. California Coastal Commission, 483 U.S. 825, 972, ed. 2d 677, 107 S. Ct. 3141, the District Court granted reconsideration to Plaintiff Walker as to the Fifth Amendment taking claim before that court. The summary judgment was not vacated to that extent, but the Court modified its original decision by incorporating by reference, as memorandum and order granting reconsideration. The effect on Walker, as expressed by the District Court's memorandum, was that he was not collaterally estopped from "relitigating" that existing cause of action.

While the Court's action did grant Walker relief to some degree, it did so by way of a process that placed an undue burden on Walker indirectly. While it may appear that Walker was put right back were he started as a result of the grant of reconsideration with respect to the Fifth Amendment Taking Claim, it is not exactly so. When the state inverse condemnation action currently underway in Superior Court of New Jersey as of May 13, 1991, fails to yield the remedy available in U.S. Court under 42 U.S.C.§ 1983, Walker will resume his efforts in U.S. District Court, but with a new complaint. Filing a new complaint, versus continuing with the existing complaint, imposes undue costs in terms of

time and expense on Walker. The time frames associated with process of service, discovery, in addition to the time and expense of the initial filing violate Walker's due process rights.

PURSUIT OF A COMPENSATORY SCHEME IN NEW JERSEY STATE SUPERIOR COURT IS AN UNREASONABLY IMPOSED HURDLE AS A PREREQUISITE TO SEEKING RELIEF IN THE U.S. COURT ON THE FIFTH AMENDMENT TAKING CLAIM.

Williamson County Regional Planning Commission v. Hamilton Bank, 473 US 172, 194 (1985) holds that a state compensatory scheme must be "reasonable, certain and adequate." The District Court's decision articulated the view that Walker is bound to pursue relief in the New Jersey Superior Court before "relitigating" the Fifth Amendment Taking Claim in Federal Court. That position is inconsistent with Williamson since it is well settled that the New Jersey Superior Court remedy is limited to market value and interest due to delay and does not afford the panoply of remedies available in U.S. Court under 42 U.S.C. § 1983.

Further, the Supreme Court of New Jersey has not ruled on a "Nollan" issue, where public access and conservation easements are reviewed in the inverse condemnation context. Pursuit of this claim in the New Jersey Courts does not meet the Williamson standard that the compensatory scheme be "reasonable, certain and adequate." Accordingly, in addition to the contrast in the type of relief available in State

versus Federal Court, it is likely that Walker will be "reinventing the wheel" with respect to the Nollan issues, unnecessarily following a circuitous path to justice. Clearly the shortest distance between Walker and a "reasonable, certain and adequate" remedy is the Federal Court.

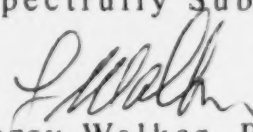
On a broader scale, applying these principles to all fifty (50) states, it may be appropriate for this Court to review the Williamson standard in light of Nollan and other recent decisions. Generally, an action in the U.S. Courts would not be initiated unless the plaintiff was reasonably sure that the State Court approach could not deliver an adequate remedy. In the interest of judicial economy, in the instant case, where Nollan controls, and a Fifth Amendment taking has occurred, it may be prudent to permit the claimant to proceed in District Court where he will eventually end up anyway. Under this theory, the entire State Court proceeding that is certain to be duplicated in FederalCourt, will be eliminated altogether.

Walker urges this Court to vacate the District Court Summary Judgment as to the Fifth Amendment Taking Claim and permit the cause of action to proceed without the New Jersey Superior Court detour.

CONCLUSION

This case involves a cavalier group of public officials operating outside the law, in a taking of property, forcing the landowner to seek relief indirectly and claiming personal immunity for their actions. There is a striking resemblance between this case and the Persian Gulf conflict over which the United States fought a war earlier this year. Petitioner Larry Walker hereby requests that this court remand this case to the U.S. District Court for the reasons stated.

Respectfully Submitted,



Larry Walker, Pro Se

Dated:

June 24, 1991

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Frog Hollow Road
Califon, New Jersey 07830

908-832-9280

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 89-675 (GEB)

LARRY WALKER,

Plaintiff

v.

THE TOWNSHIP OF TEWKSBURY,
a Municipal Corporation,
TOWNSHIP COMMITTEE OF THE
TOWNSHIP OF TEWKSBURY,
TEWKSBURY TOWNSHIP PLANNING BOARD,
GERHARD H. FUCHS, KENNETH LEE HAHN,
JAMES H. LYNCH, JR., JOHN P. MADIGAN,
PETER E. MOLL, CHARLES W. HALSEY, JR.,
RICHARD R. WIDTH, HARLEN K. WELSH,
ROBERT W. METCALF and ROBERT J. FRITZ,

Defendants.

Order Granting Summary Judgement To
The Township of Tewksbury,
Township Committee of the
Township of Tewksbury,
Gerhard H. Fuchs, Kenneth Lee Hahn,
James H. Lynch, Jr., John P. Madigan,
Peter E. Moll, Charles W. Halsey, Jr.,
Richard R. Width, Harlen K. Welsh,
Robert W. Metcalf and Rober J. Fritz.

This matter having been brought before the Court on June 19, 1989, on the return of the motion of the defendants, Tewksbruy Township, the Township Committee and the individually-named defendants, for summary judgement; the Court having read and considered the moving and opposing papers of the respective parties; the Court having heard and considered the oral argument of the attorneys for the respective parties; and good cause appearing therefore,

IT IS on this 6th day of July, 1989,

ORDERED that summary judgment be and the same hereby is granted to, and the Verified Amended Complaint and Jury Demand be dismissed with prejudice as to, the defendants, Township of Tewksbury, Township Committee of Township of Tewksbury, Gerhard H. Fuchs, Kenneth Lee Hahn, James H. Lynch, Jr., John P. Madigan, Peter E. Moll, Charles W. Halsey, Jr., Richard R. Width, Harlen K. Welsh, Robert W. Metcalf, and Robert J. Fritz.

GARRETT E. BROWN, JR.
United States District Judge
FILED: July 6, 1989

UNITED STATE DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 89-675 (GEB)

LARRY WALKER,

Plaintiff,

v.

THE TOWNSHIP OF TEWKSBURY, et al.,

Defendants.

MEMORANDUM AND ORDER

BROWN, District Judge

Before the Court is a motion for attorney's fees under 24 U.S.C. § 1988. The moving parties are those defendants who were granted summary judgement by the Court on July 6, 1989: Township of Tewksbury ("Township"), Township Committee of the Township of Tewksbury ("Township Committee"), and ten individual members of the Tewksbury Township Planning Board. The only other defendant in this action - the Tewksbury Township Planning Board ("Planning Board") - has not yet moved for any relief.

42. U.S.C. § 1988 provides that in federal civil rights actions, "the court, in its discretion, may allow a prevailing party ... a reasonable

attorney's fee as part of the costs." Prevailing defendants may recover attorney's fees from plaintiffs in a § 1983 action when that action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Huges v. Rowe, 449 U.S. 5, 14 (1980) (per curiam) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). A plaintiff also may be assessed attorney's fees if the action, though not frivolous, groundless or unreasonable at the time of filing, became so during the course of the litigation and plaintiff continued to litigate. Christainsburg, 434 U.S. at 422. A determination of whether an action is frivolous, groundless, or unreasonable, as well as a determination of the reasonableness of the fee award, lies within the discretion of the Court. Id. at 421; accord Hughes, 449 U.S. at 14 (applying Christiansburg holding to § 1983 actions).[1]

Defendants argue that this action was frivolous as to the ten individual members of the Planning Board because it is settled law that planning board members in New Jersey are absolutely immune from claims for damages. At the time plaintiff filed his complaint, however, only two decisions so held. See Jodeco, Inc. v. Hahn, 674 F. Supp. 488 (D.N.J. 1987); Anastasio v. Planning Bd. of Twp. of West Orange, 209 N.J.

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1. This Court's discretion in determining the reasonableness of a fee award is limited by the parameters established by the Supereme Court in Hensley v. Eckerhart 461 U.S. 424, 433-40 (1983).

Super. 499 (App. Div.) certif. denied, 107 N.J. 46 (1986). Neither of these decisions bind this Court. The immunity of planning board members from damages claims did not become settled law in this Circuit until Bass v. Attardi, 868 F. 2d 45 (3rd Cir. 1989), which was decided on the same day plaintiff filed his complaint. Although Christiansburg implies that frivolity may also be measured after the filing of the complaint, plaintiff points out that he also sought injunctive relief against the Planning Board members, and sued them in their official capacities as well. Had the Planning Board itself been dismissed earlier in the case, these latter claims may well have survived.[2] As such, the court cannot find that plaintiff's claims were so groundless as to justify an award of attorney's fees. Of course, claims that "prove legally insufficient to require a trial are not, for that reason alone, 'groundless' or without foundation' as required by Christainsburg" for a fee award under § 1988. Hughes, 449 U.S. at 15-16.

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2. The Third Circuit in Bass permitted claims against the planning board members in their official capacities to proceed because the board itself had not been named as a defendant. This Court dismissed the official capacity claims because, as nothing more than claims against the Planning Board itself, they were superfluous given the presence of the Board of defendant.

Defendants correctly note that the Township and the Township Committee were also dismissed as defendants, because the complaint was devoid of any allegations against them sufficient to state a § 1983 claim. Defendants claim that this pleading omission, coupled with plaintiff's admission that he had no claims against either of these defendants, justifies an award of fees.

Under the circumstances, the Court is reluctant to award fees. To begin with, a fee award against a plaintiff under § 1988 is the exception rather than the rule, for the contrary would "undercut the efforts of Congress to promote the vigorous enforcement of the provisions of §1983." Christiansburg, 434 U.S. at 422. Moreover, plaintiff's original counsel withdrew, and subsequent counsel argued the difficulty of defending a complaint drafted by another attorney. This difficulty, more than anything else, may have resulted in plaintiff's admission that no claim existed against the Township or the Township Committee. Finally, it is clear from the fee affidavit of defendant's counsel that the focus of this litigation has been on plaintiff's claims against the Planning Board and its members. Any fee award based on meritless claims against the other defendants would therefore be nominal at best. Accordingly, the Court will deny defendants motion.

For the above reasons, it is on this 8th day of September, 1989,

ORDERED that defendants' motion for attorney's fees be and is hereby denied.

GARRETT E. BROWN, JR., U.S.D.J.
FILED: September 11, 1989

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 89-675 (GEB)

LARRY WALKER

Plaintiff,

v.

THE TOWNSHIP OF TEWKSBURY, et al.,

Defendants.

MEMORANDUM AND ORDER

BROWN, District Judge

I. INTRODUCTION

This matter is before the Court on a motion for summary judgment brought by defendant Tewksbury Township Planning Board (the "Planning Board"). On July 6, 1989, this Court granted summary judgement in favor of the Township of Tewksbury, the Township Committee, and the ten individual members of the Planning Board. The Planning Board itself is the only remaining defendant in this action.

On December 4, 1989, this Court heard oral argument on the Planning Board's motion for summary judgment. During the time allotted under the rules

for the filing of briefs, plaintiff had failed to submit any evidence for the filing of briefs, plaintiff had failed to submit any evidence to oppose the motion, nor had he filed an affidavit under Fed.R.Civ.P 56 (f) seeking a continuance. Nevertheless, plaintiff attempted at oral argument to rely on evidentiary material which was not before the Court. In the interest of ensuring fairness to the parties, the Court permitted supplemental briefing by both parties, and plaintiff has now submitted an affidavit which he contends is sufficient to defeat the Planning Board's motion.

II. BACKGROUND

Plaintiff is the owner of a tract of land known as Block 36, Lot 3 in Tewksbury Township. In late 1988, plaintiff applied to the Planning Board for subdivision approval for a residential development under the Municipal Land Use Law, N.J.S.A. § 40:55D-1 et seq. After conducting public hearings on the application, the Planning Board approved it by resolution on December 21, 1988 (the "Resolution"), subject to several conditions which prompted plaintiff to file this lawsuit under 42 U.S.C. § 1983.

The Resolution, which was read into the record by the Planning Board in plaintiff's presence, provides that the subdivision application "be approved and granted subject to the following conditions":

1. A restriction be placed in each deed preventing any further subdivision of all 19 new lots and remaining lands.

2. Conservation easement as fixed on the plans shall be granted to Tewksbury Township subject to approval of form and substance by the Planning Board Attorney and Township Engineer.

3. Curbing as shown on the subdivision plans shall be eliminated except as shall be designated by the Township Engineer on cul-de-sacs and at intersections.

4. Applicant shall deposit with the Township the sum of $100,000 representing his fair share contribution for off-tract improvements deemed reasonable and necessary as a result of his development.

5. The applicant shall contact the Tewksbury Trail Association and work toward mutual agreement on including a trail easement through the subdivision.

6. The plans and specifications shall be revised, if necessary, at the applicant's own expense to incorporate all requirements of review agencies in sufficient detail to be 'construction ready' and be reviewed and approved by the Township Engineer.

7. Compliance with all other applicable Federal, State, County and Municipal legislative enactments, rules and regulations.

See Complaint, Exhibit A (copy of Resolution). See also Affidavit of David B. Rubin, Exhibit B (December 21, 1988 transcript at 2-3).

In the First Count of his complaint, plaintiff recites five of the seven conditions placed on the subdivision approval - Conditions #1, 2, 4, 5, and 6 - but specifically alleges only two of those conditions to be violative of his federal constitutional rights. First, plaintiff claims that Condition #5, which purportedly requires him to "contact the Tewksbury Trail Association and work toward a mutual agreement on including a trail easement through the subdivision", constitutes a taking of property without just compensation in violation of the Fifth Amendment. Second, plaintiff charges that Condition #4, which requires plaintiff to deposit $100,000 in escrow as a pro-rata contribution for unspecified off-tract improvements, violates his equal protection rights. In addition, plaintiff alleges that he was denied the opportunity to present and cross-examine witnesses at the public hearings, in violation of N.J.S.A. § 40:55D-10 and the procedural due process clause of the Fourteenth Amendment. He also claims that the Planning Board's actions abridged his substantive due process rights.

In the Second Count of the complaint which is apparently a pendent state claim[1], plaintiff avers that defendants' actions "tortiously interfere with the contractual rights and privileges of the plaintiff with .. Hirschberg Development Company, Inc." Plaintiff alleges that he agreed to sell the property to Hirschberg, at a contract price of $5.25 million, but presumably because of the conditions placed of the subdivision approval, "anticipate[s] that Hirschberg ... will attempt to terminate the contract..."

The relief which plaintiff seeks is not entirely clear from the face of the complaint. Although plaintiff states in paragraph 2 that this is an action " for preliminary and permanent injunctive relief, and damages," the ad damnum clauses of both the First Count and Second Count requests only compensatory and punitive damages.

II. DISCUSSION

A. ABSTENTION

Defendant's initial contention is that the Court should abstain under Buford v. Sun Oil Co., 319 U.S. 315 (1943). Abstention from the exercise of federal jurisdiction "is the exception, not the rule." Colorado

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1. Plaintiff's brief rather disingenuously characterizes it as both a state tort claim and a § 1983 claim, or an amalgam of the two.

River, Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976). As such, abstention is appropriate "only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." County of Allegheny v. Frank Masuda Co., 360 U.S. 185, 188-89 (1959). Under Burford, the "important countervailing interest" is the state's interest in regulating areas of purely local concern free from unnecessary federal interferences, To that end, a federal court "may abstain to avoid disrupting the efforts of a state 'to establish a coherent policy with respect to a matter of substantial public concern.'" Heritage Farms, Inc., v. Solebury Twp., 671 F. 2d 743, 746 (3d Cir. 1982) quoting Colorado River, 424, U.S. at 814.

There are a few subjects of regulation more local in character than land use, and federal courts have frequently invoked Burford to abstain in cases involving a complex system of land use regulation. See, e.g., Fralin & Waldron v. City of Martinsville, 493 F. 2d 481 (4th Cir. 1974). As the Third Circuit has recently explained, a federal court should not sit "as a statewide board of zoning appeals hearing challenges to actions of municipalities." Izzo v. Borough of River Edge, 843 F. 2d 765, 769 (3d Cir. 1988). By the same token, the "mere existence of land use regulation will not automatically mandate federal court abstention." Id. Rather, the critical inquiry must be the degree of interference which federal

adjudication would impose on the efforts of the state to implement a concededly valid system for land use regulation.

The Third Circuit in Izzo set out three factors to guide the Court's abstention determination when a federal issue is present in the case[2]: (1) the subject of the regulation must be of significant and special concern to the state; (2) the state regulatory scheme must be detailed and complex; and (3) the federal issues must be unresolvable without requiring the district court to immerse itself in the technicalities of the state's scheme. See Izzo, 843 F2d at 769. Here, although the regulation of land use is of undoubted special concern to the State of New Jersey, the regulatory scheme is not nearly as complex as the one in Burford, nor will the Court be forced to involve itself in the "technicalities" of that scheme to decide the constitutional claims advanced by plaintiff. Moreover, there is little danger that this action for damages will impede the policies

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2. Since this action was brought under 42 U.S. C. § 1983, the "presence of a federal basis for jurisdiction may raise the level of justification needed for abstention." Colorado River, 424 U.S. at 815 n.21. This does not mean, of course, that the presence of federal issues precludes abstention. See Alabama Pub. Serv. Comm'n v. Southern Ry., 341, U.S. 341 (1951).

reflected in New Jersey's Municipal Land Use Law.[3] Indeed, the "policies embodied in the [Municipal Land Use Law] are not being attacked - it is rather the application of those policies by a single township that is at issue. In fact, if it is found that the defendants acted unlawfully, the state and local policies will be vindicated." Heritage Farms, 671 F 2d at 748. The Court therefore finds that Buford abstention is inappropriate, and will accordingly turn to the merits of defendant's motion for summary judgment.

B. THE TAKING CLAIM

Plaintiff's complaint alleges that the Planning Board's imposition of a "condition" that plaintiff work toward the establishment of a trail easement across the property constitutes a taking of property without just compensation in

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3. A different case might well be presented if plaintiffs were seeking injunctive relief, for such relief could be the type of "obvious irritant to state-federal relations" which might warrant abstention . See County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189-90 (1959). However, plaintiff here only seeks damages in the ad damnum clauses of his complaint, in contrast with the factually parallel complaint he filed in the state court, in which he asks the state court to strike all of the allegedly unconstitutional conditions from the Resolution approving the subdivision application.

violation of the Fifth Amendment.[4] Defendant contends, and this Court agrees, that plaintiff's claim is not ripe for judicial review, and that even if it were, it would fail under Fifth Amendment standards.

The law is settled that a taking claim under the Fifth Amendment is not ripe until the state had denied just compensation. See Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 n. 13 (1985). If a state "provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Fifth Amendment] until it has used the procedure and been denied just compensation". Id. at 195. New Jersey provides such a procedure, see Peduto v. City of North Wildwood, 696, F. Supp. 1004, 1009 (D.N.J. 1988), aff'd, 878 F 2d 725 (3d Cir. 1989), which is essentially a mandamus action to compel the state to initiate an inverse condemnation proceeding.

Plaintiff admits his failure to invoke the state remedy, but he contends that it is inadequate. His claim of inadequacy, however, is that the New Jersey procedure cannot afford the same panoply of remedies available under 42 U.S.C. § 1983. Plaintiff has cited no

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4. Although plaintiff does not state in his complaint, it seems that his claim that the Planning Board imposed a conservation easement larger than that to which he ad agreed is also a taking claim.

authority, and this Court is aware of none, which holds that a state procedure is inadequate under the Just Compensation Clause Because it is not coextensive with § 1983. Plaintiff concedes that the New Jersey procedure permits him to recover the fair market value of any property taken, together with interest. See Plaintiff's Brief, at 10. Although other damages may in some cases be available, plaintiff has offered no evidentiary support for these damages, nor has he otherwise demonstrated that such damages must be available under state procedure to make the procedure "adequate." The Court finds that plaintiff has failed to carry his burden of proving the inadequacy of New Jersey's just compensation procedures, See Williamson, 473 U.S. at 196-97, and that the taking claim is therefore not ripe for review.

Alteratively, the Court notes that even it plaintiff's taking claim were ripe, it would still be subject to dismissal under Fed.R.Civ.P. 56. The Fifth Amendment does not protect a landowner from governmental action which deprives him of the most profitable use or uses of his property. See, e.g., Goldblatt v. Hempstead, 369 U.S. 590,592 (1962). Consequently, even a substantial reduction in the value of land occasioned by state action does not constitute a taking if the land retains economically feasible uses. See, e.g., Hadacheck v. Sebastian, 239 U.S. 394 (1915) reduction in value from $800,000 to $60,000 not a taking); Pace Resources, Inc. v. Shrewsbury Twp., 808 F2d 1023 (3d Cir. 1987) (reduction in value from $495,600 to $52,000 not a taking). Here, the

undisputed evidence is that plaintiff, before the alleged taking, had a contract with Hirschberg Development Company, Inc. to sell the property for $5.225 million. See Supplemental Affidavit of Linda Celauro, Exhibit D (Plaintiff's Deposition, at 42). Yet, after the alleged taking, plaintiff received an offer of $4.1 million from a different buyer. See Affidavit of Linda Celauro, Exhibit C (#20 of Plaintiff's Answers to Interrogatories). Under the authority cited above, plaintiff cannot successfully claim a diminution in the value of the property from $5.225 million to $4.1 million is a taking. The Court will therefore grant summary judgment in favor of defendant on this claim.

C. THE EQUAL PROTECTION CLAIM

Plaintiff alleges that his equal protection rights were violated when the Planning Board imposed a condition in the Resolution requiring him to contribute $100,000 as his pro-rata share of unspecified off-tract improvements. This claim, however, is nothing short of frivolous, as the record amply shows.

To begin with, the evidentiary submissions of defendant demonstrate that plaintiff explicitly agreed to the $100,000 contribution. In fact, plaintiff told the Planning Board during the public hearing on November 28, 1988, that the money "can go into a general fund. We don't care if you ever spend it for the reason that it was contributed." See Affidavit of Mary E. Baird, Exhibit 5, at 108. Plaintiff cannot now claim that the Planning Board abridged his

constitutional rights by imposing a condition to which he expressly agreed.[5]

Moreover, plaintiff's unsupported claim of discrimination is precisely the type of conclusory allegation which "cannot be accepted at face value" in the area of civil rights. See Pace Resources, 808 F2d at 1026. As the Third Circuit found in Pace Resources, such a claim should be dismissed, particularly where, as here, it "fails to identify any similarly situated property that was treated differently." id. (citing Rotolo v. Borough of Charleroi, 532 F2d 920 (3d Cir. 1976). Although plaintiff seeks leave to amend, citing Rotolo, this is not a motion under Fed.R.Civ.P. 12(b) (6), but a motion for summary judgement. The fatal deficiency of plaintiff's claim is not in the allegations, but in the failure to support the allegations with any

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5. Plaintiff cites to the same discussion relied on by the Planning Board. See Baird Affidavit, Exhibit 5, at 105-08. Plaintiff's position seems to be that the $100,000 contribution was contingent on the paving of Meadow Lane. Yet that position is belied by the record. Although the parties discussed the use of some of the money to improve Meadow Lane, nowhere in the record did plaintiff indicate that this was a sine qua non for the $100,000 contribution. In addition, the discussion referred to improvement, not necessarily pavement, of Meadow Lane, and the December 7, 1988 transcript demonstrates that the Planning Board intended to regravel Meadow Lane. See Rubin Affidavit, Exhibit B, at 15a. In short plaintiff's position finds no support in the record.

evidence. Accordingly, the Court will enter summary judgment against plaintiff on this equal protection claim.

D. THE PROCEDURAL DUE PROCESS CLAIM

Plaintiff alleges in his complaint that the Planning Board denied him procedural due process during the public hearings. That allegation has support in the evidence on record. The Planning Board conducted numerous public hearings on plaintiff's subdivision application. Plaintiff and members of the public were present at each of these hearings, and plaintiff was accorded every opportunity to present and respond to the evidence. The record reveals not a single occasion on which plaintiff was denied the opportunity to be heard. What the record does reveal is the Planning Board followed the dictates of the Municipal Land Use Law, N.J.S.A. 40:55D-10, and constitutional requirements in the conduct of the public hearings. See Rogin v. Bensalem Twp., 616 F.2d 680 694 (3d Cir. 1980). Indeed, plaintiff himself complained that the hearings had been too long, and urged the Planning Board to conclude them on November 28, 1988. See Affidavit of Mary E. Baird, Exhibit 5, at 140-42. Accordingly, the Court finds no merit to plaintiff's procedural due process claim and summary judgement is therefore appropriate.

E. THE SUBSTANTIVE DUE PROCESS CLAIM.

Plaintiff's claim that the actions of the Planning Board violated his

substantive due process rights must suffer the same fate as his other claims because there is no evidence in the record to support it. To prove that the Planning Board transgressed substantive due process guarantees, plaintiff must show that it "could have no legitimate reason for its decision." Shelton v. City of College Station, 780 F.2d 4756, 483 (5th Cit. 1986) (en banc) (quoted in Pace Resources, 808 F.2d at 1034). Far from demonstrating that the Planning Board had no legitimate reason for the conditions it imposed, the record shows that the Planning Board merely adopted many of the conditions which plaintiff himself had submitted in his proposed resolution. See Celauro Affidavit, Exhibit A (Defendant's Exhibit D-5) and Exhibit B (Plaintiff's Deposition, at 16). For example, Condition #1 (resubdivision ban), #4 (contribution for off-tract improvements) and #5 (trail easement) of the Resolution were all taken verbatim from plaintiff's own proposed resolution. Id. Plaintiff cannot now complain that the Planning Board somehow violated his substantive due process rights by adopting the very restrictions which he suggested.

The only condition challenged by plaintiff which did not appear in his proposed resolution was Condition #6, which required plaintiff to revise the plans and specifications to incorporate any required governmental approvals. Plaintiff's only objection to this was that all required approvals have already been received, and the presence of Condition #6 in the Resolution would therefore lead an interested purchaser

of the property "to believe that there are things to be done that, in fact, are not required..." See Rubin Affidavit, Exhibit B (December 21, 1988 transcript at 5-6a). To assuage plaintiff's fears, the Planning Board amended Condition #6 to obligate plaintiff to revise the plans and specifications only "if necessary." Whatever these facts may demonstrate in the realm of conventional land use planning, they are certainly not evidence of the type of arbitrary governmental action necessary to implicate substantive due process guarantees. In the absence of such evidence, the Court refuses to entertain plaintiff's attempt to constitutionalize this planning dispute:

> Such a claim is too typical of the run of the mill dispute between a developer an a town planning agency ... to rise to the level of a due process violation. The authorit[ies] ... all suggest that the conventional planning dispute - at least when not tainted with fundamental procedural irregularity, racial animus, or the like - which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution ... It is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under section 1983.

Creative Environments, Inc. v. Estabrook 680 F.2d 822, 833 (1st Cir. 1982). Summary judgment against plaintiff on this claim will be granted.

F. THE TORTIOUS INTERFERENCE CLAIM

Plaintiff alleges in Count Two what is apparently a pendent state claim for tortious interference with contractural relations. Because the Court finds that plaintiff's federal claims have no merit, it declines to adjudicate the pendent claim. See Lovell Manufacturing v. Export-Import Bank, 843 F.2d 725, 734 (3d Cir. 1988). To the extent that plaintiff in his brief characterizes this claim as a federal on under § 1983, the Court will dismiss it because of the same failure of evidentiary support which doomed the other federal claims.

In light of the above rulings, this Court need not address defendant's motions to strike plaintiff's compensatory and punitive damage claims.

For the above reason, it is on this 31st day of January, 1990,

ORDERED that the motion of defendant, Tewksbury Township Planning Board, for summary judgment be and is hereby granted.

GARRETT E. BROWN, JR., U.S.D.J.
FILED: February 1, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 89-675 (GEB)

LARRY WALKER,

Plaintiff,

v.

THE TOWNSHIP OF TEWKSBURY, et al.,

Defendants

MEMORANDUM AND ORDER

BROWN, District Judge

This Court granted summary judgement in favor of defendant, Tewksbury Township Planning Board (the "Planning Board"), by Memorandum and Order dated January 31, 1990. Plaintiff has now moved for reconsideration under Local Rule 12 (I).

The purpose of a motion for reconsideration is to "correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotniocki, 779 F.2d 906, 909 (3d Cir. 1985). See also Local Rule 12 (I) (motion for reargument must set forth "concisely the matters or controlling decisions which counsel believes the Court has overlooked"). Most of plaintiff's contentions are simply a

reiteration of those presented in opposition to the Planning Board's motion for summary judgment, and therefore do not deserve any additional attention here. Specifically, plaintiff has offered no argument of fact or law to persuade the Court that a manifest error was made in granting summary judgment of the equal protection, procedural due process, substantive due process, and tortious interference claims.

Plaintiff does make one persuasive argument for reconsideration. He contends that the Court erred in granting summary judgment on the merits of his claim under the Takings Clause of the Fifth Amendment. The complaint alleged that the Planning Board exacted a taking of property without just compensation, in violation of the fifth Amendment, by imposing the following "conditions" on the approval of plaintiff's residential subdivision application:

> [Plaintiff] shall contact the Tewksbury Trail Association and work toward a mutual agreement on including a trail easement through the subdivision.
>
> Conservation easement as fixed on the plans shall be granted to Tewksbury Township subject to approval of form and substance by the Planning Board Attorney and Township Engineer.

See Complaint, Exhibit A.

This Court granted summary judgement on the taking claim, holding that it was

not ripe for review under Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), because plaintiff had not utilized New Jersey's inverse condemnation procedure to seed just compensation. The court also noted, in the alternative, that even if the taking claim had been ripe, it would have been subject to dismissal under Fed.R.Civ.P. 56. In so noting, the Court referred to undisputed evidence of record which indicated that the property retained significant value even after the alleged taking. Citing Pace Resources, Inc., v. Shrewsbury Twp., 808F.2d 1023 (3d Cir. 1987), the Court concluded that "plaintiff cannot successfully claim that a diminution in the value of the property from $5.225 million to $4.1 million is a taking." See Memorandum and Order, at 9.

Plaintiff now claims that this alternative rationale is inconsistent with the recent opinion of the Supreme Court clarified that a public easement is a "taking" of property regardless of the impact on the value of the property:

> To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather ... "a mere restriction of its us," ... is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one

> of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them ... In [Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419 (1982)] we observed that where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, see 458 U.S., at 432-433, n.9, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," id., at 434-435. We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuously be traversed, even through no particular individual is permitted to station himself permanently upon the premises.

Id. at 831.

It would seem that Nollan would be inconsistent with a dismissal of plaintiff's taking claim under Fed.R. Civ.P. 56. This does not mean that summary judgment on this claim should be vacated, because plaintiff admits, and this Court also held, that the claim is not ripe for review under Williamson and

its progeny. Plaintiff, however, has filed, or is in contemplating filing, an inverse condemnation action in state court, and does not wish to be collaterally estopped from litigating the taking claim based on this Court's earlier discussion concerning the merits of that claim. This Memorandum should make clear that, to the extent the Court indicated that summary judgment against plaintiff would be appropriate on the merits of the taking claim, that view would appear to be inconsistent with Nollan and therefore should not serve to bar plaintiff from relitigating the issue.

For the above reason, it is on this 25th day of June, 1990,

ORDERED that plaintiff's motion for reconsideration be and is hereby granted, and it is

FURTHER ORDERED that the Court's Memorandum and Order of January 31, 1990, granting summary judgement in favor of the Planning Board, be and is hereby modified in accordance with the above Memorandum.

GARRETT E. BROWN, JR., U.S.D.J.
FILED: June 25, 1990

UNITED STATE COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5596

LARRY WALKER,

Appellant

v.

THE TOWNSHIP OF TEWKSBURY,
a municipal corporation;
TOWNSHIP COMMITTEE OF THE
TOWNSHIP OF TEWKSBURY;
TEWKSBURY TOWNSHIP PLANNING BOARD;
GERHARD H. FUCHS; KENNETH LEE HAHN;
JAMES H. LYNCH, JR.; GEORGE B. ANDERSON;
JOHN P. MADIGAN; PETER E. MOLL;
CHARLES W. HALSEY, JR.; RICHARD R. WIDTH;
HARLEN K. WELSH, ROBERT W. METCALF;
and ROBERT J. FRITZ

On appeal From the United States District
Court for the District of New Jersey
(D.C. Civil No. 89-00675)
District Judge:
Honorable Garrett E. Brown, Jr.

Submitted Under Third Circuit Rule 12 (6)
January 22, 1991

Before: BECKER, HUTCHINSON,
Circuit Judges

and SMITH, District Judge*

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

Circuit Judge

ATTEST:

Sally Mrvos, Clerk

DATED: January 30, 1991
FILED: January 30, 1991

* The Honorable D. Brooks Smith, United States District Judge for the Western District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5596

LARRY WALKER,

APPELLANT

v.

THE TOWNSHIP OF TEWKSBURY,
a municipal corporation;
TOWNSHIP COMMITTEE OF THE
TOWN OF TEWKSBURY
TEWKSBURY TOWNSHIP PLANNING BOARD;
GERHARD H. FUCHS; KENNETH LEE HAHN;
JAMES H. LYNCH, JR.; GEORGE B. ANDERSON;
JOHN P. MADIGAN; PETER E. MOLL;
CHARLES W. HALSEY, JR.; RICHARD R. WIDTH;
HARLEN K. WELSH; ROBERT W. METCALF;
AND ROBERT J. FRITZ

(D.C. Civil No. 89-00675)

**SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR
REHEARING IN BANC**

PRESENT: SLOVITER, Chief Judge, BECKER
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICS, COWEN, NYGAARD,
and ALITO, Circuit Judges

And SMITH, District Judge *

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT,

Circuit Judge

DATED: March 28, 1991
FILED: March 28, 1991

* The Honorable D. Brooks Smith, United States District Judge for the Western District of Pennsylvania, sitting by designation.

Office of the Clerk
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

April 17, 1991

Mr. Larry Walker
RR1, Box 497-1
Califon, New Jersey 07830-9400

Re: Walker vs. Tewksbury, et al.
No. 90-5596

Dear Mr. Walker:

Receipt is acknowledged of your letter dated April 3, 1991 in regard to your Petition for Panel Rehearing in the above-captioned case.

Your petition dated February 27, 1991 was forwarded to the Court as a Petition for Panel Rehearing and the Court thereafter treated your petition as a Petition for Rehearing in Banc and entered its order on March 28, 1991.

Very truly yours,

Kathleen Grady,
Deputy Clerk

KG/ch

cc: Linda B. Celauro, Esq.
David B. Rubin, Esq.

NEW JERSEY MUNICIPAL LAND USE LAW. N.J.S.A. 40:55D

40:55D-25. Power of planning board.

a. The planning board shall follow the provisions of this act and shall accordingly exercise its power in regard to:

(1) The master plan pursuant to article 3[40:55D-28 et seq.];

(2) Subdivision control and site plan review pursuant to article 6 [40:55D-37 et seq.];

(3) The official map pursuant to article 5 [40:55D-32 et seq.];

(4) The zoning ordinance including conditional uses pursuant to article 8 [40:55D-62 et seq.];

(5) The capital improvements program pursuant to article 4 [40:55D-29 et seq.];

(6) Variances and certain building permits in conjunction with subdivision, site plan and conditional use approval pursuant to article 7 [40:55D-60 et seq.];

b. The planning board may:

(1) Participate in the preparation and review of programs or plans required by State or Federal law or regulation;

(2) Assemble data on a continuing basis as part of a continuous planning process; and

(3) Perform such other advisory duties as are assigned to it by ordinance or resolution of the governing body for the aid and assistance of the governing body or other agencies or officers.

c. In a municipality having a population of 2,500 or less, a nine member planning board, if so provided by ordinance, shall exercise, to the same extent and subject to the same restrictions, all the powers of a board of adjustment; but the Class I and the Class III members shall not participate in the consideration of applications for development which involve relief pursuant to subsection d. of section 57 of P.L. 1975, C291 (C. 40:55D-70).

Adopted. L. 1975, c.291, §16. **Amended. L.** 1985, c.516, §8, effective March 22, 1986.

40:55D-37. Grant of powers; referral of proposed ordinance; county planning board approval.

a. The governing body may by ordinance require approval of subdivision plats by resolution of the planning board as a condition for filing of such plats with the county recording officer and approval of site plans by resolution of the planning board as a condition for the issuance of a permit for any development, except that subdivision or individual lot applications for detached one or two dwelling-unit buildings shall be exempt from such site plan review and approval; provided that the resolution of the board of adjustment shall substitute for that of the planning board whenever the board of adjustment has jurisdiction over a subdivision or site plan pursuant to subsection 63b. of this act [40:55D-76].

b. Prior to the hearing on adoption of an ordinance providing for

planning board approval of either subdivisions or site plans or both or any amendment thereto, the governing body shall refer any such proposed ordinance or amendment thereto to the planning board pursuant to subsection 17a. of this act [40:55D-26].

c. Each application for subdivision approval, where required pursuant to section 5 of P.L. 1968, c. 285 (C. 40:27-6.3), and each application for site plan approval, where required pursuant to section 8 of P.L. 1968, c. 285 (C. 40:27-6.6) shall be submitted by the applicant to the county planning board for review or approval, as required by the aforesaid sections, and the municipal planning board shall condition any approval that it grants upon timely receipt of a favorable report on the application by the county planning board or approval by the county planning board by its failure to report thereon within the required time period.

Adopted. L. 1975, c.291 §28.

40:55D-48. Procedure for preliminary major subdivision approval.

a. An ordinance requiring subdivision approval by the planning board shall require that the developer submit to the administrative officer a plat and such other information as is reasonably necessary to make an informed decision as to whether the requirements necessary for preliminary approval have been met; provided that minor subdivisions pursuant to section 35 of this act [40:55D-47] shall not be subject to

this section. The plat and any other engineering documents to be submitted shall be required in tentative form for discussion purposes for preliminary approval.

b. If the planning board required any substantial amendment in the layout of improvements proposed by the developer that have been the subject of a hearing, and proceed upon, as in the case of the original application for development. The planning board shall, if the proposed subdivision complies with the ordinance and this act, grant preliminary approval to the subdivision.

c. Upon the submission to the administrairve officer of a complete application for a subdivision of 10 or fewer lots, the planning board shall grant or deny preliminary approval within 45 days of the date of such submission to within such further time as may be consented to by the developer. Upon the submission of a complete application for a subdivision or more than 10 lots, the planning board shall grant or deny preliminary approval within 95 days of the date of such submission or within such further time as may be consented to by the developer. Otherwise, the planning board shall be deemed to have granted preliminary approval to the subdivision.

Adopted. L. 1975, c..291, §36
Amended. L. 1979, c..216, §16; **L.** 1984, c.20, §9, effective July 1, 1984.

No. 91-292

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

LARRY WALKER,

Petitioner,–

vs.

TOWNSHIP OF TEWKSBURY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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September 12, 1991

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the courts below correctly apply the Court's constitutional principles articulated in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) and its progeny, that a taking claim under the Fifth Amendment is not ripe where the landowner has not obtained a final decision and also has not sought compensation through the procedures provided by the State for doing so?

2. Did the courts below correctly apply the Court's constitutional principles articulated in *Butz v. Economou*, 438 U.S. 478 (1978), and other cases, in determining members of municipal planning boards in New Jersey are absolutely immune in their individual capacities from damages actions under 42 U.S.C. § 1983 for quasi-judicial planning board decisions?

LIST OF PARTIES TO THIS PROCEEDING

Petitioner:

Larry Walker

Respondents:

Tewksbury Township Planning Board

Past and present members of Tewksbury Township Planning Board in their individual capacities:

Gerhard H. Fuchs

Kenneth Lee Hahn

James H. Lynch, Jr.

John P. Madigan

Peter F. Moll

Charles W. Halsey, Jr.

Richard R. Width

Harlan K. Welsh

Robert W. Metcalfe

Robert J. Fritz

---

* Party defendants in the United States District Court for the District of New Jersey, but neither appellees in the United States Court of Appeals for the Third Circuit nor respondents herein are: the Township of Tewksbury; the Township Committee of the Township of Tewksbury; past and present members of Tewksbury Township Planning Board in their official capacities, Gerhard H. Fuchs, Kenneth Lee Hahn, James H. Lynch, Jr., John P. Madigan, Peter E. Moll, Charles W. Halsey, Jr., Richard R. Width, Harlan K. Welsh, Robert W. Metcalfe, and Robert J. Fritz.

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No. 91-292

In The

Supreme Court of the United States

October Term, 1991

LARRY WALKER,

Petitioner,

vs.

TOWNSHIP OF TEWKSBURY, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari. Petitioner conceded in the district court the two issues presented in the petition, and thus, has failed to preserve those issues for this Court's consideration. Petitioner conceded below that the Planning Board members were absolutely immune in their individual capacities from suit under 42 U.S.C. § 1983 for quasi-judicial Planning Board actions. Petitioner also conceded below that his taking claim is not ripe. In any event, as more fully explained *infra*, the decisions below are wholly consistent with the constitutional principles established by the Court.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Larry Walker instituted this action on February 14, 1989[1] against Tewksbury Township, its governing body, the Township Committee, its Planning Board, and certain past and present members of its Planning Board in both their individual and official capacities. The Complaint alleges that the Planning Board Resolution of December 21, 1988, approving Walker's preliminary major subdivision application, violated his constitutional rights and tortiously interfered with his contract to sell the property (Aa1-9; Sa1-2).[2]

Specifically, Walker alleges in his Complaint that the alleged imposition of a horse trail easement constitutes a taking of property without just compensation (Aa5-6, ¶ 23; Sa2, ¶ 5). He further alleges that a provision for conservation easements in the subdivision approval was improper as well, without, however, specifically stating it as a taking claim in his Complaint (Aa4, ¶ 16; Aa6-7, ¶ 29; Sa2, ¶ 2).

The Planning Board, the Township, the Township Committee, and the individual past and present Planning Board members denied all material allegations, and most specifically, denied that the conservation easement had been imposed and denied that there was any horse trail easement (Aa10-17; Sa3-9).

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1. On the same date, Walker filed an action in the Superior Court of New Jersey seeking direct review of the same Planning Board Resolution of December 21, 1988 on both constitutional and state law grounds and seeking specific performance by the developer who had contracted to purchase the property.

2. As used herein: "Aa" refers to "Appendix of Appellant Larry Walker" and "Sa" refers to "Supplemental Appendix" filed with the Third Circuit.

By bench decision[3] and order of July 6, 1989, the district court granted summary judgment to: (1) Tewksbury Township and the Township Committee on the basis that Walker simply failed to allege any claim against them; (2) the individual past and present Planning Board members in their individual capacities on the basis of absolute quasi-judicial immunity;[4] and (3) the individual past and present Planning Board members in their official capacities on the basis that, with the Planning Board itself as a separately named defendant, their presence was superfluous (Aa32-36; Aa40-41).

On October 27, 1989, the Planning Board filed and served its motion for summary judgment extensively supported by affidavits and certifications (Sa10-12; Aa81-232; Aa68-80).

In response, Walker submitted a brief — nothing more. In reply to the unsupported allegations in Walker's brief, the Planning Board further supported its summary judgment motion with additional affidavits (Aa233-278).

At oral argument on December 4, 1989, Walker's counsel presented two excuses for his lack of preparedness: (1) he thought the Planning Board's summary judgment motion was premature because Walker still owed some discovery to the Planning Board; and (2) he thought the Planning Board's affidavits and certifications supported Walker's contentions (Aa283-21 to 285-10; Aa302-11 to 302-21). After instructing Walker's counsel as to the

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3. Walker has failed to append the bench decision to his petition. It appears in the appendix filed with the Third Circuit (Aa31-39).

4. Walker's counsel expressly conceded and expressly declined to challenge dismissal against the individual defendants in their individual capacities on the ground of absolute quasi-judicial immunity (June 9, 1989 Letter Brief of Walker's counsel; July 6, 1989 Transcript of Argument and Decision, Aa32).

requirements of Fed. R. Civ. P. 56(e) and (f), the district court gave Walker's counsel additional time to supplement the record to support Walker's contentions that the "conditions" of the Resolution were imposed upon him (Aa284-21 to 285-4; Aa304-18 to 305-25; Aa306-19 to 307-25; Aa381). Walker's counsel then submitted an affidavit supplementing the record (Aa309-380).

By Memorandum and Order of January 31, 1990, the district court granted summary judgment to the Planning Board (Pet. App. 8a-23a).[5] The court declined to exercise a *Burford*[6] abstention, giving weighted consideration to the factor that, since Walker was seeking only damages and not judicial surgery to remove "conditions" from the Resolution (as he sought in state court), the maintenance of the federal action was not an "irritant to state-federal relations" (Pet. App. 12a-15a; 15a n.3).

Walker's claims that the alleged exaction of a horse trail easement and conservation easements constituted a taking were disposed of on two bases: (1) the claims were not ripe because Walker failed to use New Jersey's inverse condemnation procedure and further failed to support, factually or legally, his assertion of the inadequacy of the procedure; and (2) in any event, Walker could not establish a taking claim because the undisputed record showed no substantial diminution in value of the property (Pet. App. 15a-18a).

The district court determined Walker's equal protection claim to be "nothing short of frivolous" (Pet. App. 18a) and Walker's procedural due process claim to have "no merit" (Pet. App. 20a).

In granting judgment to the Planning Board on Walker's

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5. "Pet. App" refers to the Appendix to the Petition.

6. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

substantive due process claim also, the district court found that the undisputed facts of record plainly showed that all challenged "conditions" in the Resolution (except one requiring Walker to revise the plans, if necessary, to incorporate requirements of other reviewing governmental agencies) were *proposed* by Walker, *not imposed*, by the Planning Board (Pet. App. 20a-22a).[7]

Dealing with Walker's dual characterization of his tortious interference claim, the Court declined to exercise jurisdiction over it as a pendent state claim and granted judgment on it as a federal claim (Pet. App. 23a).

By its June 25, 1990 Memorandum and Order, disposing of Walker's motion for reconsideration, the district court affirmed its grant of summary judgment to the Planning Board, modifying its basis therefor in one minor respect as to the taking claim. Concluding that, contrary to its earlier opinion, the lack of substantial diminution in value of property is not fatal to a taking claim, the court reposited, as the sole basis for summary judgment on the taking claim, the lack of ripeness of the claim (Pet. App. 25a-27a).

> This does not mean that summary judgment on this claim should be vacated, because *plaintiff admits*, and this Court so held, that the claim is not ripe for review under *Williamson* and its progeny. Plaintiff, however, has filed, or is

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7. Although the district court referred only to Walker's proposed Resolution, it is clear from the preceding portions of the opinion and from the entire record, that the entire record, not merely Walker's proposed Resolution, furnished the support for this conclusion (Pet. App. 21a).

There is no dispute of record that all of the "conditions" challenged by Walker in this action were either: (1) conditions proposed by him as part of his application; (2) conditions to which he expressly agreed; or (3) not conditions at all.

> contemplating filing, an inverse condemnation action in state court, and does not wish to be collaterally estopped from litigating the taking claim based on this Court's earlier discussion concerning the merits of that claim.

(Pet. App. 27a-28a) (emphasis added).[8]

On January 30, 1991 the Third Circuit summarily affirmed the judgment below (Pet. App. 29a-30a). A petition for rehearing was denied on March 28, 1991 (Pet. App. 31a-32a).

B. Facts

Walker, a developer, purchased a 130-acre, rural-agricultural tract in Tewksbury Township on November 23, 1987 for $3,000,000 (Aa193; Aa3, ¶ 9; Aa228-229).

On July 20, 1988, Walker agreed to sell the property to Hirschberg Development Company ("Hirschberg")for $5,225,000, title to close after Walker obtained "preliminary major subdivision approval for a 17-lot single family detached subdivision" and "all other government approvals required in connection with such preliminary major subdivision approval" (Aa263-266). Hirschberg agreed to take title subject to deed restrictions against further subdivision, conservation easements, assessments for off-tract

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8. Conceding the taking claim was not ripe, Walker's counsel specifically argued to the district court that the alternate basis for dismissal of the taking claim (there was no taking) should be vacated to permit Walker to institute an inverse condemnation action in the New Jersey courts: "Walker should be granted an opportunity to press an inverse condemnation claim in the New Jersey Superior Court, rather than risk being bound by this Court's determination on the merits of a controversy it has found not properly before it" (Memorandum in Support of Motion for Reconsideration," pp. 2, 9, by Walker's counsel).

improvements associated with an access road, and assessments for other off-tract improvements provided Walker credited Hirschberg for such other assessments (Aa264, ¶¶ 10 to 12; Aa252-15 to 253-22). Walker advised the Planning Board of his contract with Hirschberg in January, 1989, the month after the December 21, 1988 Resolution (Aa251-17 to 252-14; Sa1-2).

The Planning Board is a board created, pursuant to state statute, as an independent approving authority of Tewksbury Township, with authority over subdivision control and site plan review (Aa2, ¶ 6; N.J.S.A. 40:55D-25(a)(2)). In 1988, Walker applied to the Planning Board for preliminary major subdivision approval for 19 residential building lots on his property (Aa3, ¶ 10). The Planning Board conducted five public hearings thereon, from August 17, 1988 to November 28, 1988 (Aa82-83, ¶¶ 2-6; Aa184). At a December 7, 1988 meeting, approval was granted, as memorialized in a Resolution of December 21, 1988 (Aa3-4, ¶¶ 12-13; Sa1-2).

As specified *infra*, there was no dispute of record that the conservation easement was proposed by Walker as part of his comprehensive subdivision application, not imposed by the Planning Board; and there was no horse trail easement.

Prior to the formal application, Walker made an informal presentation to the Planning Board concerning the proposed subdivision and, in connection therewith, distributed to the Planning Board members and adjoining property owners a booklet representing his subdivision plan (Aa192-212, Aa219-12 to 220-15). Therein, Walker represented, as part of his proposal to the Planning Board and the public, that he would grant conservation easements:

> Area A will be a conservation easement for the stream and associated wetland. Area B will be a

> conservation easement to prevent disturbance of the critical slopes. All other critical slopes will be covered by conservation easements.

(Aa204).

In Walker's Sensitive Area Plan, prepared by Walker's own engineer and presented by Walker to the Planning Board as part of his application, Walker expressly indicated the areas of the conservation easement (Aa216, Aa223-3 to 223-20).

During the September 15, 1988 public hearing, Walker again advised, both through his own representations and those of his environmental expert, that an integral part of his subdivision application was his grant of conservation easements to protect all environmentally sensitive areas (Aa121-10 to 121-20; Aa122-20 to 123-1; Aa124-7 to 124-14). During this hearing, Walker's expert opined that a horse trail would have a negligible environmental impact (Aa125-22 to 126-5).

During the final public hearing on November 28, 1988, Walker again promoted the desirability of his subdivision application by referring to the conservation easements he was granting:

> We have large conservation easements there. We could have had 12 driveways along this area weaseling in and out between wetlands because driveways can go through where roads can't. I just wanted to leave it alone. I don't want to have the things, the trees cut down and most of it is not that suitable, any way.
>
> So I just wanted to leave it natural, so that that area remains as is, theoretically, forever.

(Aa172-2 to 172-13). At this hearing, Walker told the Board that his application was "a Planning Board's dream," referring, *inter alia*, to his proposed conservation easement (Aa181-9 to 182-6).

On December 7, 1988, in response to an inquiry, Walker referred to his prior offer to give the Township "25 acres with the restriction that it would be used only for fishing along the Rockaway Creek portion and horse trails within" (Aa335). Walker retreated somewhat on horse trails (Aa333-334), and the Planning Board candidly conceded it could not require horse trails from Walker:

> O.K. Mr. Walker says he doesn't want to give it to us so we are . . . so we are . . . if he doesn't want to give it to us we can't force him because we don't have it in the ordinance, uh, the ordinance.

(Aa341). Shortly thereafter, however, Walker said he would consider the possibility of a horse trail, but would make no commitment (Aa357).

Consistent with his representations throughout the public hearings, Walker's own proposed resolution included the following relevant provisions:

> 2. Conservation easements as illustrated on the plans shall be granted to Tewksbury Township.
>
> * * *
>
> 5. The applicant shall contact the Tewksbury Trails Association and work toward a mutual agreement on including a trail easement through the subdivision.

(Aa214, Aa222-7 to 222-12).

On December 21, 1988, the Planning Board adopted a Resolution of Memorandum required by N.J.S.A. 40:55D-10(g) (Sa1-2; Aa4, ¶ 13). Therein, the Planning Board gave Walker all he had asked for, *i.e.*, everything Walker had represented to the Planning Board and the public as his comprehensive application. The Resolution included those items that Walker had expressly proposed as part of his application, including the conservation easement (Sa2, ¶ 2; Aa90; Aa121-124; Aa172; Aa204; Aa216). The adopted Resolution also included some wholly precatory language, reflecting Walker's expression of intent, that Walker would discuss the possibility of a horse trail easement; as the Resolution and record plainly show, neither Walker nor the Planning Board considered the provision to be a condition for the grant of a horse trail easement (Sa2, ¶ 5; Aa335, Aa341, Aa357).

After the subdivision approval, Hirschberg resisted closing with Walker on a basis unrelated to the Planning Board Resolution approving Walker's preliminary major subdivision application. The matter Hirschberg saw as an impediment to closing was Walker's failure to obtain approvals and/or meet standards of the New Jersey Department of Environmental Protection[9] (Aa267-273; Aa255-7 to 256-4).

On February 14, 1989, Walker filed this action and a parallel action in the Superior Court of New Jersey, wherein the Township, Planning Board, and Hirschberg were named defendants (Aa68

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9. As aforementioned, the contract placed upon Walker the obligation to obtain not only the preliminary major subdivision approval but "all other governmental approvals required in connection therewith" (Aa264, ¶ 13).

to 75).[10]

On July 10, 1989, Walker received an offer of $4,100,000 for the purchase of the property, which Walker rejected on August 28, 1989 (Aa230-231). Between February 14, 1989 and July 10, 1989, Walker had received an unspecified number of other offers on the property, the details of which have not been particularized (Aa259-10 to 259-19).

On May 13, 1991, Walker instituted an action in the Superior Court of New Jersey against certain past and present Planning Board members and Township Committee members and several attorneys to the Township and Planning Board, all in their official capacities, alleging inverse condemnation, violation of constitutional rights, and intentional tort claims.

REASONS FOR DENYING THE WRIT

The primary reason for denial is Walker's failure to preserve below the issues presented in his petition. Walker's counsel expressly conceded, and expressly declined to challenge, the propriety of dismissing the claims against the Planning Board members in their individual capacities under 42 U.S.C. § 1983 on the basis of their absolute immunity as quasi-judicial officers (June 9, 1989 Letter Brief of Walker's counsel; Aa32). Walker's

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10. On July 7, 1989, the state court granted judgment to Hirschberg and rescinded the contract, deciding Walker was responsible for termination of the contract by bringing a specific performance action against Hirschberg when Walker was unable to perform (Aa76-80).

The state action was dismissed against the Township on October 31, 1989.

By bench decision on August 22, 1991, the state court directed complete judgment for the Planning Board on all of Walker's claims, dismissing the Complaint with prejudice.

counsel also expressly conceded that his taking claim was not ripe, instead arguing to the district court that it should vacate its alternative rationale that there was no taking in order to permit him to ripen his taking claim through a state court inverse condemnation action ("Memorandum in Support of Motion for Reconsideration," pp. 2, 9; Pet. App. 28a). Moreover, the decisions below are based upon the particular facts of this case and do not conflict with any constitutional principles set forth by the Court. No important issues warrant review by the Court.

A. The courts below properly concluded that the individual planning board members are entitled to absolute quasi-judicial immunity.

Relying upon *Bass v. Atardi*, 868 F.2d 45 (3d Cir. 1989), the courts below dismissed this suit against the members of the Planning Board in their individual capacities on the basis that "members of municipal planning boards in New Jersey are absolutely immune in their individual capacities from damage actions brought pursuant to 42 U.S.C. § 1983." 868 F.2d at 50. Before this Court, petitioner Walker mischaracterizes the holding of the *Bass* decision and its underlying rationale. Contrary to Walker's contentions, the *Bass* decision and its antecedents are wholly consistent with the authority of the Court.

The Court has long held "that there are some officials whose special functions require a full exemption from liability." *Butz v. Economou*, 438 U.S. 478, 508 (1978). In each case, the Court has undertaken "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." 438 U.S. at 508 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976)). In beginning this inquiry, the actual governmental function performed by the governmental official must be analyzed; the office, in and of itself, may not be the basis for the grant or denial of absolute immunity. *Butz*, 438 U.S.

at 511-12.

It is well settled that judges are entitled to absolute immunity for all acts committed within their judicial jurisdiction, including grave procedural errors. *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978). The policy behind this grant of absolute immunity is simple. If a civil action could be maintained against a judge by virtue of an allegation of malice, judges would lose "that independence without which no judiciary can be either respectable or useful." *Bradley v. Fisher*, 80 U.S. 335, 347 (1872).

Absolute immunity has also been extended to protect those nonjudicial officials whose activities are integrally related to the judicial process and involve the exercise of discretion comparable to that of a judge. In *Butz*, the Court extended absolute judicial immunity to those persons who performed adjudicatory functions within the federal agencies. The Court highlighted the similarity between the functional duties of judges and agency hearing officers:

> The [agency] proceedings are adversary in nature. They are conducted before a trier of fact insulated from political influence. A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits together with the pleadings constitutes the exclusive record for decision. The parties are entitled to know the findings and conclusions on all the issues of fact, law, or discretion presented on the record.
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> . . . [The hearing examiner's] powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on

> proffers of evidence, regulate the course of the hearing, and make or recommend decisions. More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures from the parties or other officials within the agency.

438 U.S. at 513 (citations omitted).

The Third Circuit in *Bass*, following the dictates of *Butz*, functionally analyzed the statutorily-defined powers of municipal planning boards in New Jersey and concluded that the duties of planning board members in the State of New Jersey are so integrally related to the judicial process as to warrant the grant of absolute immunity. 868 F.2d at 50.[11] In analyzing these powers, the Third Circuit deferred to the functional analysis of *Jodeco, Inc. v. Hann*, 674 F. Supp. 488 (D.N.J. 1987), where the court painstakingly addressed and reviewed in detail the statutory and functional responsibilities of municipal agencies established pursuant to New Jersey's Municipal Land Use Law, N.J.S.A. 40:55D-1, *et seq.*:

> Under N.J.S.A. 40:55D-10, a municipal zoning agency is required to hold a public hearing on each application for development, adoption,

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11. In fact, a cursory reading of the *Bass* decision readily shows that petitioner Walker has blatantly mischaracterized the underlying principles of *Bass* in his Petition at pages 14 to 19, in that Walker erroneously argues that the Third Circuit applied the principles of absolute immunity to planning boards based upon the individuals simply holding public office without a functional analysis of the quasi-judicial duties mandated by their respective offices and positions.

> revision or amendments of a "master plan." N.J.S.A. 40:55D-10(a). At such hearings, which are required to be recorded either stenographically or electronically, the presiding officer has the authority to administer oaths and issue subpoenas compelling the production of documents and the attendance of witnesses, who must give sworn testimony and be subjected to the rigors of cross-examination. N.J.S.A. 40:55D-10(c), (d), (f). Although technical rules of evidence are not utilized, the agency has the power to "exclude irrelevant, immaterial or unduly repetitious evidence." N.J.S.A. 40:55D-10(e). Furthermore, much like any judicial tribunal, the agency is required to include in its written decision on each zoning application thorough findings of fact and conclusions based thereon. N.J.S.A. 40:55D-10(g). Thus, a decision by any zoning body which is devoid of any justification or explanation for its position can be attacked under the statute as arbitrary and capricious.

674 F. Supp. at 497.

The Third Circuit succinctly concluded in *Bass*, after this detailed functional review that "[w]e need not retravel the path followed by Judge Brotman [in *Jodeco*] to simply say we agree." 868 F.2d at 50. The court concluded that the duties of planning board members in the State of New Jersey are so integrally related to the judicial process as to warrant the grant of absolute immunity. 868 F.2d at 50.

Bass simply applies the *Butz* two-part analysis in extending absolute judicial immunity to quasi-judicial officers, *i.e.*, the cloak of absolute judicial immunity must stem "from the characteristics

of the judicial process" and must be "necessary to assure that judges . . . can perform their respective functions without harassment or intimidation." 438 U.S. at 512. Both parts of the *Butz* "test" for extending absolute judicial immunity are met with regard to individual municipal planning board members in New Jersey.

First, the judicial nature of the planning board members' acts in reviewing and approving a preliminary major subdivision application, pursuant to their statutory powers enumerated under N.J.S.A. 40:55D-25, as was involved herein, is facially apparent from New Jersey's Municipal Land Use Law, N.J.S.A. 40:55D-1, *et seq.*

These statutory provisions ensure the independence of the planning board members. Members are appointed for terms of one to four years and may not be removed from office except for cause after a public hearing. N.J.S.A. 40:55D-23. No member may participate in any matter in which he has a direct or indirect personal or financial interest. N.J.S.A. 40:55D-23(b). Notice of the hearings must be given. N.J.S.A. 40:55D-11. The presiding officer is empowered to administer oaths and issue subpoenas. N.J.S.A. 40:55D-10. Witnesses testify under oath and are subject to cross-examination by all interested parties. N.J.S.A. 40:55D-10. The hearings are recorded verbatim. N.J.S.A. 40:55D-10.

The planning board must state its findings of fact and conclusions in each decision on an application. N.J.S.A. 40:55D-10. An applicant may obtain court review of a planning board decision by instituting an action in lieu of prerogative writ in the Law Division of the Superior Court of New Jersey. Rule 4:69 of the New Jersey Court Rules. Walker has instituted such action.

Clearly then, the action of the individual Planning Board

members in considering Walker's application and adopting a Resolution approving the application with certain conditions constitutes the type of quasi-judicial action for which public officials have been held to be absolutely immune from suit, by the Court in *Butz*.

Second, absolute immunity from suit is necessary to prevent the deterrent effect that permitting suit would have on the willingness of citizens to serve as planning board members:

> ". . . [M]any of these local zoning officials serve voluntarily, often at night, without remuneration; yet they expend extensive time and effort in preparing and participating in the land use development of the community. Were this court to hold that these board members are without any immunity, the inevitable consequence would be to deter intelligent civic-minded persons from serving on municipal land use boards. The fear of incurring great expense in attorney's fees, losing time from employment and suffering the anxiety and distress resulting therefrom, could have no other effect."[12]

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12. The New Jersey Appellate Division, in *Anastasio v. Planning Board*, 209 N.J. Super. 499, 507 A.2d 1194, *certif. denied*, 107 N.J. 46, 526 A.2d 136 (1986), highlighted similar public policy considerations in support of its conclusion that planning board members enjoy absolute immunity in their individual capacities:

> We think that the public interest re quires that persons serving on planning boards considering applications for development act with independence and without fear that developers, who will frequently have significant financial resources and the ability to litigate, not bring them into court. The possibility of facing expensive and aggravating litigation as a result of making a decision on an application for development may in a subtle way impact on the decision making process.

209 N.J. Super. at 526, 507 A.2d at 1208.

Jodeco, 674 F. Supp. at 498 (quoting *Centennial Land & Development Co. v. Township of Medford*, 165 N.J. Super. 220, 228, 397 A.2d 1136, 1140 (Law Div. 1979)).

In sum, the *Bass* decision applies the two-part functional and policy analysis mandated by the Court in *Butz*. As the functional duties of members of municipal planning boards in New Jersey are so integrally related to the judicial process and immunity is necessary to assure that planning board members can perform their decisional functions without harassment or intimidation, absolute quasi-judicial immunity is warranted.

Contrary to Walker's assertions, the *Bass* decision does not stand for the proposition that all acts of planning board members are absolutely immune. (Petition at 13). Neither does the *Bass* decision apply absolute immunity "across the board," as Walker suggests it does (Petition at 14). *Bass* simply applies the principles enunciated by this Court in *Butz* that require a functional analysis of the duties and responsibilities of planning board members as quasi-judicial duties.

In fact, despite Walker's present denial of the judicial nature of the five public hearings at which his subdivision application was being considered, on November 28, 1988, he became so exasperated with the judicial-like proceedings that he insisted the public hearings be brought to an end, opining three times during the same statement that enough testimony had been taken and enough had been heard from the public (Aa181-4 to 181-6; Aa181-15 to 181-16; Aa182-8 to 182-9).

Walker also asserts that a planning board only acts administratively and without discretion. (Petition at 15-17). He argues that if there is no discretion, then there can be no quasi-judicial function. His interpretation is based on the word "shall" in N.J.S.A. 40:55D-25 which provides that "[t]he planning board

shall follow the provisions of this act and *shall* accordingly exercise its power in regard to: [specific types of planning activities]." (emphasis added). However, the use of the word "shall" is not a deprivation of a planning board's discretion but a grant of jurisdiction that delineates the powers of a planning board. A planning board's discretion is used not in determining its duties, but in making decisions on issues arising from the jurisdictional grant. Like a court, a planning board cannot abandon its obligations delineated by the jurisdictional grant. Planning board members must exercise judgment in assessing testimony and credibility, draw factual and legal conclusions, apply the principles delineated in the Municipal Land Use Law, N.J.S.A. 40:55D-1, *et seq.*, and protect the public welfare. All of these quasi-judicial duties were implicated and effected during the planning board public hearings and during the overall process in approving Walker's subdivision application.

Finally, Walker suggests that *Bass* is not in harmony with *Wood v. Strickland*, 420 U.S. 308 (1975), which conferred only qualified immunity upon the individual members of school boards. This case, however, is patently dissimilar. In *Wood*, the Court indicated that its decision was limited to the "specific context of school discipline." 420 U.S. at 322. Furthermore, it is worth noting in *Wood* that the record showed an almost complete absence of quasi-judicial procedure. The students were not allowed to present their own evidence or attend a hearing on the matter. The school board simply began the proceeding by reading a written statement of facts it had previously found in closed session. The students were also not allowed the opportunity to confront or cross-examine their accusers.

Here, in contrast to *Wood*, there were five public hearings, sworn testimony, cross-examination, findings and conclusions drawn by the planning board from the record, rights of appeal, and other quasi-judicial accoutrements.

Thus, Walker's arguments must fail. *Bass* is consistent with the principles delineated by the Court in *Butz*. There are no special or important reasons for granting certiorari. Therefore, the petition should be denied.

B. The courts below properly concluded that petitioner's taking claim was not ripe.

In his petition, petitioner Walker posits that "[t]wo (2) of the seven (7) conditions of approval imposed required granting a conservation easement on approximately fifty (50) acres (condition #2) and a trail easement (condition #5) through the private property consisting of the nineteen (19) new residential building lots" (Petition at 9). To the contrary the district court specifically concluded that the undisputed facts of record were that the "conditions" (which include the conservation easement, and that Walker discuss the possibility of a horse trail with the trail association — *not* a horse trail easement) were *proposed* by Walker, *not imposed* by the Planning Board (Pet. App. 21a).[13]

Based upon this infirmity alone, the petition should be denied. Certiorari should be denied when review is sought of a lower court decision which turns upon an analysis of the particular facts involved. The Court simply does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also Texas v. Mead*, 465 U.S. 1041 (1984) (Opinion by Justice Stevens respecting the denial of certiorari). The Court has also long held that it is improper to take a case to review a factual issue where the findings of fact made by the district court receive the concurrence of the court of appeals. "[A] court of law, such as this Court . . . cannot

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13. Furthermore, no horse trail easement was imposed. The Planning Board merely asked Walker to consider the possibility, conceding it could not require it. Walker considered the possibility and decided against it. There is no horse trail.

undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

In any event, the courts below followed the established principles of the Court in determining Walker's taking claim is not ripe. In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), the Court recognized two requisites to ripeness of a taking claim.

First, the government entity charged with implementing the restriction that allegedly effects a taking must have reached a "final decision" regarding the application of the restriction to the property at issue. 473 U.S. at 186. Second, the claimant must have sought and been denied compensation through the procedures the State has provided. 473 U.S. at 194. The second requisite applies only if the State's procedures are "adequate . . . for seeking just compensation." 473 U.S. at 195. Failure to meet either of these requisites will result in dismissal on the basis of the ripeness doctrine.

To meet the "final decision" requisite, complaining property owners must submit a plan for development to the appropriate governing body. 473 U.S. at 187. Additionally, property owners must avail themselves of the opportunities to obtain administrative relief in the event of an unfavorable decision by such body. 473 U.S. at 187. A request for a variance or a waiver from the regulatory restrictions are examples of the types of relief that must be sought.[14] This level of "finality" is necessary in order to assess

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14. In *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981), the Court held that a specific application challenge to a mining restriction statute was not ripe because the property owners did not seek (Cont'd)

"the economic impact of the challenged action and the extent to which the restriction interferes with reasonable investment-backed expectations," two significant factors in the taking analysis. 473 U.S. at 190-191.

To meet the "sought compensation through State procedures" requisite, a complaining property owner must use available state procedures and be denied just compensation. 473 U.S. at 195. *Williamson* states: "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." 473 U.S. at 194 (citation omitted). A property owner suffers no deprivation under the Fifth Amendment until the owner has unsuccessfully attempted to obtain just compensation through state procedures. 473 U.S. at 195.

Based upon these established dual ripeness principles, Walker's taking claim is deficient. First, Walker cannot meet the "finality" requirement recognized by this Court in *Williamson*. One measure of the lack of finality is Walker's instituting his taking claim action in federal court prior to the completion of his state court action, which he had instituted to obtain a vacation of the challenged Planning Board Resolution.

Additionally, this lack of finality is more glaring than that described in *Williamson* because here the Planning Board resolution that allegedly imposes conditions upon the subdivision was simply an adoption of Walker's subdivision plan complete with Walker's conditions. If Walker was not happy with his subdivision plan, he might have submitted a new or revised one

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(Cont'd)
administrative relief by requesting a variance or waiver. Such avenues were mandated because a "mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions." 452 U.S. at 297.

which may have been accepted. While New Jersey's Municipal Land Use Law confers certain rights upon an applicant, like Walker, whose preliminary major subdivision application is approved, N.J.S.A. 40:55D-49, nothing in the statute precludes Walker, despite the approval, from commencing a new and different preliminary major subdivision application on the same piece of property.[15]

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986), is instructive. The Court there held that a County Planning Commission's rejection of a subdivision plan was not final and definitive because some development still might have been permitted by the Commission. 477 U.S. 351-52. As in *Williamson*, the Court required the landowner to do more than just submit a development proposal and have it rejected before satisfying the "final decision" requirement. The extra step required was a resubmission of the plan to see what development would be permitted.

For both of these reasons, Walker fails to meet the "finality" requirement. Therefore, his claim is not now ripe for adjudication.

Second, Walker also has failed to meet the "sought compensation through State procedures" requisite to ripeness as well. He seeks to excuse this deficiency, however, by arguing that "[p]ursuit of a compensatory scheme in New Jersey State Superior

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15. What Walker is actually seeking is court approval of a subdivision plan different from the one that he presented and the Planning Board approved. One of the difficulties with a court sitting as a planning board on a new subdivision plan (apart from usurping the Planning Board's statutory authority) is that the members of the public are thereby deprived of their statutorily guaranteed due process rights. N.J.S.A. 40:55D-12(b) (notice shall be given to all property owners within 200 feet of the property); N.J.S.A. 40:55D-10(d) (during the hearings "the right of cross-examination shall be permitted to all interested parties").

Court is an unreasonably imposed hurdle" because the New Jersey remedy is "limited to market value and interest due to delay and does not afford the panoply of remedies available in U.S. Court under 42 U.S.C. § 1983." (Petition at 21). Yet, this is the same type of condition imposed by the Court in *Williamson*.

New Jersey has the type of procedure, contemplated by *Williamson* and its progeny, that Walker *must* invoke and by which *relief need be denied* by a New Jersey court before Walker reinstitutes federal suit. *See Peduto v. City of North Wildwood*, 696 F. Supp. 1004, 1009 (D.N.J. 1988), *aff'd*, 878 F.2d 725 (3d Cir. 1989) (where the district court noted that New Jersey plaintiffs need invoke the state inverse condemnation procedure before filing a federal taking claim).

New Jersey's inverse condemnation procedure finds its origin in the state's eminent domain statute. N.J.S.A. § 20:3-1, *et seq.* Under New Jersey common law, a mandamus procedure exists, based on an alleged violation of state and federal constitutional just compensation guarantees, to compel the government to initiate condemnation procedures. *See In re Jersey Central Power & Light Co.*, 166 N.J. Super. 540, 544, 400 A.2d 128, 129 (App. Div. 1979).

Walker bears the burden of demonstrating that the state procedure is inadequate or unavailable. *Williamson*, 473 U.S. at 196-97. Such burden is not met by Walker's assertion that the New Jersey remedy is inadequate as it does not mirror the remedies under § 1983.[16] This argument fails to realize that the "sought

16. The Ninth Circuit has also twice addressed this issue and under its analysis, Walker's inadequacy argument fails. In *Sinaloa Lake Owners Ass'n v. Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1317 (1990), the landowners' federal claim which sought taking compensation after the State breached a privately owned dam and destroyed a lake, was not ripe because the landowners failed to exhaust State law procedures. The claimants (Cont'd)

compensation through State procedures" requirement has nothing to do with remedies. It was imposed by the Court as a requisite to ripeness of a taking claim under the Fifth Amendment. No Fifth Amendment violation occurs until just compensation is denied.

Williamson clearly teaches: "[B]ecause the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action . . . is not 'complete' until the State fails to provide adequate compensation for the taking." 473 U.S. at 195.

Even if someday the Court were to deem it appropriate to reconsider the requisites-to-ripeness principles of *Williamson*, in

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(Cont'd)
tried to establish the inadequacy of the State procedures by focusing the court's attention on the delay involved in the State system and the lack of sympathy the State courts had previously displayed for private owners. The Ninth Circuit held that the claimants' bare assertion that their case would not go to trial for four years or more under the State system was not enough to show the futility of resorting to State relief. 882 F.2d at 1403. Nor did the landowners' assertion that the California State courts were unsympathetic to private owners in just compensation cases advance their argument.

Similarly, a landowner in *Austin v. City & County of Honolulu*, 840 F.2d 678 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988), attempted to convince the Ninth Circuit that even though he did not seek compensation in the State courts, his claim was ripe because the State procedures were not "reasonable, certain and adequate." 840 F.2d at 680. Although the court found no Hawaiian case that recognized inverse condemnation as a cause of action, it said Hawaii's procedures were adequate within the terms of *Williamson*. 840 F.2d at 681. The court so held because despite there being no cases recognizing inverse condemnation, neither were there any rejecting it: "Until the State courts establish that landowners may not obtain just compensation through inverse condemnation actions under any circumstances, Hawaii's procedures are adequate." 840 F.2d at 681.

light of the Court's determination in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), as Walker suggests (Petition at 22), the present action is not the case in which to do so. In this case, the conservation easement was given by Walker, not taken by the Planning Board, and there is no horse trail easement. Additionally, Walker assiduously avoids the sharp distinction between the possessory public access easement at issue in *Nollan* and the nonpossessory, nonpublic conservation easement to protect and preserve environmentally-sensitive areas (wetlands, critical slopes, flood hazard areas) from disturbance here (Aa204, 216). Walker merely alludes to this distinction in the context of his argument that he does not expect the New Jersey state courts to consider the conservation easement here to be a taking of an interest in land. (Petition at 21). Neither would the *Nollan* Court, which states that a taking requires a physical occupation of the property by the government or others, and that

> [A] "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

483 U.S. at 832.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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